Nos. 88-449 and 88-513

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

JOHN F. HEALY, Et Al.,

Appellants,

—v.—

THE BEER INSTITUTE, Et Al.,

Appellees.

WINE AND SPIRITS WHOLESALERS OF CONNECTICUT, INC.,

Appellant.

—v.—

THE BEER INSTITUTE, Et Al.,

Appellees.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF *AMICUS CURIAE* OF THE COMMONWEALTH OF PENNSYLVANIA

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QUESTION PRESENTED

Whether all state "affirmation" requirements, which have the effect of fixing the price of alcoholic beverages in all other states and extra territorially regulate permissible prices in other states, thereby violate the Commerce Clause.

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INTEREST OF AMICUS[1]

Pennsylvania acts in its sovereign capacity both under the Twenty-first Amendment when it controls the purchase of liquor within its borders as the sole purchaser and as a distributor, and when it represents the interests of its citizens in a properly functioning inter-state and intra-state economy. Pennsylvania operates a liquor monopoly which purchases virtually all wine and distilled spirits sold in the Commonwealth. With purchases of $400 million dollars in 1987-88, the Commonwealth of Pennsylvania is the single largest purchaser of wine and distilled spirits in the United States. Pennsylvania is thus significantly

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[1] Consent to the filing of this brief has been obtained from counsel to the parties.

and uniquely harmed by defendants' actions, by being deprived of the normal advantages which large volume purchasers enjoy in an unfettered market and is further harmed by the restriction placed by affirmation on inter-brand competition in markets within its borders.

INTRODUCTORY STATEMENT

This Complaint presents a challenge to a Connecticut beer price affirmation statute. This is not a new issue for this Court -- twice before, the Court has been faced with challenges to affirmation statutes. Seagram v. Hostetter, 384 U.S. 35 (1966); Brown-Forman Corp. v. New York State Liquor Authority, 476 U.S. 573 (1986). The Commonwealth of Pennsylvania believes that the affirmation statutes, regulations, and policies of the vast majority of States are violative of the commerce clause of the Constitution, and that a single, dispositive ruling by this Court is needed to resolve this issue.

Statute by statute rulings have not deterred the proliferation of affirmation statutes and practices, each designed to circumvent the latest ruling. And as the

Connecticut statute at issue here demonstrates. challenging such practices individually can become almost meaningless as states refine them sufficiently. Nonetheless, the interlocking, national network of such individual state laws unconstitutionally regulates interstate commerce. A decision of national scope, directed at not merely one state's statute, is both merited and needed.

STATEMENT OF FACTS

A. History of Price Affirmation

In 1933, by virtue of the passage of the Twenty-first Amendment to the United States Constitution, which repealed Prohibition, the States were granted broad regulatory power over the transportation, possession, delivery and use of alcoholic beverages within their borders. Seventeen states opted to control the distribution of liquor by operating wholesale liquor monopolies. Many of those states (including Pennsylvania) also have state-run retail liquor monopolies. These states are known as the "Control States." The remaining states, and the District of Columbia, chose to regulate distribution of liquor by licensing and regulating private wholesalers and retailers.

In 1938, representatives of thirteen of the seventeen Control States met in Des

Moines, Iowa to discuss common business problems. Liquor industry members also attended the meeting. At the time of that meeting, Virginia and some other attendees already had a provision in their standard liquor purchase contracts that required suppliers to affirm that the prices charged to the state were the lowest prices at which the suppliers sold their products anywhere in the United States.

The use of similar contract provisions by all Control States was openly discussed. Within several years, all Control States, including Pennsylvania (which was not a participant at the meeting), adopted affirmation provisions in their liquor purchase contracts. This type of provision is known in the liquor industry as the "Des Moines Warranty."

In 1964, the second phase in the development of the national price affirmation

system began. In that year, New York -- a non-control state with private wholesale and retail distributors -- passed a liquor affirmation statute requiring that all suppliers affirm to the state that the prices charged to wholesalers within the state were no greater than the lowest price charged nationally for any particular item in the preceding month. The act required that sellers post these prices and maintain them for thirty days. Violators of the act were subject to criminal and civil sanctions. Chapter 531, 1964 Session Laws of New York.

In the wake of this Court's decision, in Joseph E. Seagram & Sons, Inc. v. Hostetter, 384 U.S. 35 (1966), not to invalidate the New York statute until it became operative and the actual workings of an affirmation statute and its effect on interstate commerce could be ascertained, most non-control states soon passed their own affirmation laws.

Presently, twenty non-control states ("the Affirmation Law States") have such laws or regulations. Although not in all detail identical, all affirmation laws require alcoholic beverage suppliers -- on their first sale into a state -- to charge to that state's private wholesalers a price no greater than the current lowest price offered anywhere in the United States for any particular item.

In 1972, this Court denied, without opinion, a motion for leave to file a complaint against twenty-six states who, at that time, had affirmation statutes, regulations or policies. Pennsylvania v. New York, 410 U.S. 978, reh den., 411 U.S. 977 (1973). That complaint sought to challenge only discrete portions of the national price affirmation system. Since then, this Court ha refined the state of the law with respect to t interplay between the Twenty-first

Amendment and the Commerce Clause, see Bacchus Imports, Ltd. v. Dias, 468 U.S. 263 (1984); California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc., 445 U.S. 97 (1980), and affirmation has spread to other states, providing ample time to develop economic evidence on the adverse effects of affirmation on the free market system.

In 1985, this Court denied, without opinion, a motion for leave to file a complaint against thirty-seven states with affirmation statutes, regulations or policies. Pennsylvania v. Alabama, 472 U.S. 1015 (1985). Since that time, this Court has struck down New York's prospective affirmation statute. Brown-Forman Distillers Corp. v. New York State Liquor Authority, 476 U.S. 573, 106 S.Ct. 2080 (1986). At least one Justice indicated that, now that evidence of their effects exist, retrospective affirmation requirements should be struck down as

well, Hostetter notwithstanding. Id. at ___, 106 S.Ct. at 2088 (Blackmun, J., concurring).

The result of the Brown-Forman decision has been seriatim and conflicting litigation in individual district courts challenging individual statutes. Brown-Forman Corp. v. Tennessee Alcoholic Beverage Comm'n, No. 3-86-0926, slip op. (M.D. Tenn. June 30, 1987) (striking down statute), rev'd, No. 87-5870, slip op. (6th Cir. Nov. 4, 1988); Brown-Forman Corp. v. New Mexico Dept. of Alcoholic Beverage Control, 672 F.Supp. 1383 (D.N.M. 1987) (striking down statute); United States Brewers Ass'n v. Healy, 669 F.Supp. 543 (D. Conn. 1987) (upholding statute), rev'd, 849 F.2d 753 (2d Cir. 1988), probable jurisdiction noted, 57 U.S.L.W. 3347 (Nov. 14, 1988); Brown-Forman Corp. v. South Carolina Alcoholic Beverage Control Comm'n, 643 F.Supp. 943 (D.S.C. 1986) (striking down statute).

Pennsylvania believes that the time is now ripe for this Court to address the important constitutional questions inherent in the national price affirmation system and thereby avoid piece-meal and conflicting adjudications of this national question. It is essential, as well, that the Court's consideration of this matter embrace not just affirmation statutes, but all affirmation practices. While "affirmation laws are still being enforced or defended in court in seven license states," non-statutory affirmation practices "exist[] in contract requirements in eighteen control states." Healy II, Jurisdictional Statement of Appellants 14.

B. Effects of Price Affirmation

Three types of affirmation statutes and practices have sprung up -- prospective, retrospective, and contemporaneous. This Court has already declared the prospective

type to be unconstitutional, although such statutes remain in existence in at least seven states.

Affirmation provisions of any type make it impossible for distillers to respond to market pressures and set their prices in one state without forcing them to alter their pricing policies in other states. See Joseph E. Seagram & Sons v. Gazzara, 610 F. Supp. 673, 675 n.3. (S.D.N.Y. 1985), rev'd. per curiam, 800 F.2d 49 (2d Cir. 1986). This is just as true of retrospective requirements as it is of prospective ones.

Assume that a distiller sells Brand X both in New Mexico, a prospective state, and in Arizona, a retrospective state, during January. Assume further that the distiller desires to raise the price of Brand X in New Mexico on February 1. In order to satisfy New Mexico's requirement, the distiller would also have to raise the price it charges for

Brand X in Arizona on February 1, in order to insure that New Mexico's prospective statute is not violated by the sale of Brand X at a lower price in Arizona during February.

By raising the price in Arizona on February 1, however, the distiller finds itself in violation of Arizona's retrospective statute because the price to be charged in Arizona in February now exceeds the price that was in effect in New Mexico during January. The only alternative open to this distiller is to have determined in December that, in response to market conditions extant only in New Mexico, it would increase the price of Brand X across the nation on February 1. To comply with the retrospective statute in Arizona, the distiller would have had to have discontinued all sales of Brand X in Arizona (and any other retrospective state) during January. This effect of such statutes -- amounting to

a prohibition on sales in those states -- is certainly an excessive burden upon interstate commerce.

Were the facts reversed, so that the exigencies of competition demanded a price increase for Brand X in a retrospective state such as Arizona, the producer would be required to cease sales of Brand X in all other states for all of January before introducing its higher price in Arizona. In short, it is an excessive burden for producers to comply with prospective and retrospective statutes simultaneously.

Although contemporaneous statutes reduce these time-lag problems, they do not eliminate them. For one thing, given commercial realities it is clear that a "contemporaneous" affirmation requires more than that prices be the same in other states at the exact <u>instant</u> of (to use the Connecticut law) 10:00 o'clock a.m. on the sixth day of the

month. But even if contemporaneity can be said to occur only for one split second each month, prices in other states are still required to move according to the affirmation state's mandates for that instant, plainly a directly extraterritorial effect.

The actual effects of such requirements can be illustrated by the findings of fact in Brown-Forman Corp. v. South Carolina Alcoholic Beverage Control Comm'n, 643 F. Supp. 943 (D.S.C. 1986). There, the district Court found that the South Carolina price of Jack Daniel's Black Label "is at a level consistent with consumer demand," while, at the same price, "in Arizona Jack Daniel's Black Label is not competitive with other bourbons because it is overpriced." Id. at 947.

> Brown-Forman believes that Jack Daniel's Black Label is over-priced in Arizona, and therefore, exercising good business judgment, desires to lower its Arizona price for that product expecting to increase sales. However, to remain in

> compliance with South Carolina law, Brown-Forman may not lower its Arizona price for Jack Daniel's Black Label without concurrently lowering its South Carolina price for that product. Brown-Forman believes that its South Carolina price for Jack Daniel's Black Label is consistent with consumer demand and therefore, does not wish to lower its South Carolina price.

Id. at 947-48. Thus, as the district court concluded, "South Carolina's Affirmation Statute dictates the price Brown-Forman charges for Jack Daniel's Black Label in Arizona and keeps that price artificially high." Id. at 948 (emphasis added).

In fact, each state's price affirmation requirement has the effect of converting the maximum wholesale price in that state into the de facto minimum wholesale price in all states. Since thirty-eight states have virtually identical requirements, each state's maximum wholesale price becomes the actual wholesale price throughout the Country.

A price increase to a wholesaler in one state must be accompanied by an identical increase to all public and private wholesalers in the other thirty-seven states, under that state's affirmation policy. A price decrease to a wholesaler in one state must be accompanied by an identical decrease to all public and private wholesalers in the other thirty-seven states pursuant to the laws of these other states. Therefore, price decreases will occur in one local market only if it is economical for the distributor to reduce the price equivalently across the country, and, as the findings of the district court in South Carolina, for example, demonstrate, this is unlikely to be the case.

Ironically, the affirmation network thus frustrates its own object of lowering prices to purchasing states or consumers when a control state (or a contemporaneous affirmation state with a very large in-state

distributor) is involved. If the alcohol control agency in New Hampshire, a Control State, wished to negotiate down prices charged it by a distiller, affirmation would thwart the agency's objective. It would make sense economically for the agency to negotiate prices from a volume manufacturer, given the low costs of doing business inherent in the control (or large distributorship) context. However, the distiller will not be likely to comply with the agency's request, as to do so would place a potentially large economic burden upon its operations elsewhere.

Were the distiller to accept the lower price in New Hampshire, it would find itself in violation of other states' affirmation laws. Its action in New Hampshire would entail equivalent price reductions in every other affirmation and control state in which it does business, without regard to the

commercial realities in those states. Therefore, the distiller would not be likely to assent to a lower price in New Hampshire.

There are further problems caused by the network of conflicting affirmation practices, even when contemporaneous, reminiscent of the interstate truck and train cases. See Kassel v. Consolidated Freightways Corp., 450 U.S. 662 (1981); Raymond Motor Transportation, Inc. v. Rice, 434 U.S. 429 (1978); Southern Pacific Co. v. Arizona ex rel. Sullivan, 325 U.S. 761 (1945); South Carolina State Highway Dept. v. Barnwell Bros., 303 U.S. 177 (1938).

One such problem arises from the inconsistent treatment of distiller's posted prices and changes of those prices. Suppose that the distiller posts January prices of Brand X both in Minnesota, which permits mid-month price changes at will, and in Massachusetts, which requires "good cause shown" for any schedule amendments. If the

producer alters the price for Brand X in Minnesota, but cannot get regulatory approval in Massachusetts for the lower price, the distiller would be in violation of Massachusetts' affirmation provision since Brand X is now available more cheaply in Minnesota.

To remain in compliance with Massachusetts' statute, the distiller will have to refrain until the next month from lowering its price in Minnesota unless the liquor agency in Massachusetts, exercising its statutory discretion, permits the price reduction. In this scenario, Massachusetts' statute is unconstitutional. "The protections afforded by the Commerce Clause cannot be made to depend on the good grace of a state agency." Brown-Forman, 476 U.S. at ___ n.5, 106 S.Ct. at 2086 n.5.

The varying treatments accorded promotional allowances complicate the issue yet further. If a price reduction in Minnesota,

which allows any and all discounts for quantity, were considered a volume discount in other states, the distiller would be forced to reduce the price posted in all of those affirmation states that restrict discounts for quantity. This results in artificially low prices in those states which restrict or prohibit sales incentives. "By defining the 'effective price' of liquor differently from other States, [a State] can effectively force [a distiller] to abandon its promotional allowance program in States in which that program is legal, or force those other States to alter their own regulatory schemes" to conform. Brown-Forman, 476 U.S. at ___, 106 S.Ct. at 2087.

SUMMARY OF ARGUMENT

Despite this Court's invalidation of prospective affirmation requirements, they remain in a number of States, while a number of others have adopted other variants of affirmation. The reasoning of this Court's prior affirmation ruling is applicable to all types of affirmation requirements, however. Given the fact that any State choosing to abandon affirmation requirements would expose itself to the risk of significant economic harm, such affirmation requirements will persist in the absence of a definitive ruling invalidating all such requirements.

Such a ruling is merited in this case. Any type of affirmation requirement (1) acts on its own to dictate prices extraterritorially, and (2) acts in concert with affirmation requirement in other states

to regulate the price of alcoholic beverages throughout interstate commerce.

The plain purpose of affirmation requirements, moreover, is to attain a competitive advantage for a State's own consumers -- or the state itself, as a purchaser. Such a purpose is suspect under the commerce clause. It is fatal where, as here, this purpose is carried out by insisting that consumers in other States surrender whatever competitive advantages they possess.

As this Court noted in passing on a prospective statute in Brown-Forman Distillers Corp. v. New York State Liquor Authority, 476 U.S. 573 (1986), the affirmation practice is properly governed by the rule of Baldwin v. G.A.F. Seelig, Inc., 294 U.S. 511 (1935). In Baldwin, the Court struck down a requirement that distributors of milk in New York warrant that, if they purchased milk from producers outside New York, they would pay a

price no lower than the price charged by New York producers for similar milk.

The Baldwin Court ruled that one state may not project its legislation into another state by regulating the price to be paid in the other state for any product. Affirmation practices similarly require that a producer warrant that it will not charge a lower price than that charged in the regulating state, to any purchaser in any other state. This clearly regulates the price that may be paid in other states, an unconstitutional defect.

The effect of a network of such statutes, moreover, is to set a de facto minimum price throughout all affirmation states; since prices cannot, at whatever relevant time, be lower in any state in the nation without violating 37 other affirmation laws or contract provisions, prices cannot be set on a competitive basis reflecting true market forces in each state market. The potential

for -- and the reality of -- conflicting obligations under manifold state affirmation regimes further burdens the free market of interstate commerce guaranteed by the federal Constitution.

The States have demonstrated no willingness to abandon affirmation unless each and every State's affirmation practice is invalidated. Seriatim litigation in 37 district courts would be an unwieldy and uneconomical use of judicial resources. Given the incentives for each State, this issue will only be settled by a single, authoritative and dispositive ruling of this Court. This Court ought, therefore, to declare all alcoholic beverage price affirmation requirements to be unconstitutional.

ARGUMENT

I. THE PRICE AFFIRMATION SYSTEM UNCONSTITUTIONALLY BURDENS INTERSTATE COMMERCE.

In Joseph E. Seagram & Sons, Inc. v. Hostetter, 384 U.S. 35 (1966), this Court ruled that it "need not now decide" whether a state affirmation requirement "could ever constitute so grave an interference with a company's operations elsewhere as to make the regulation invalid under the commerce clause." Id. at 42-43. The Court concluded by noting that "[a]lthough it is possible that specific applications . . . may engender concrete problems of constitutional dimension, it will be time enough to consider any such problems when they arise." Id. at 52.

Twenty years later, in Brown-Forman Distillers Corp. v. New York State Liquor Authority, 476 U.S. 573 (1986), the Court was faced with the specific applications of the

successor statute to the very one challenged in Seagram. There, the Court declared, "We agree . . . that a 'prospective' statute such as Connecticut's beer affirmation statute, or New York's liquor affirmation statute, regulates out-of-state transactions in violation of the Commerce Clause." 476 U.S. at ___, 106 S.Ct. at 2086.

Despite this ruling, prospective affirmation requirements remain in force in at least seven states, while "retrospective" or "contemporaneous" affirmation requirements exist in an additional 12 states. Eighteen other states impose affirmation requirements through contractual clauses demanded by the state-run liquor monopoly. It is clear that states will not voluntarily cease enactment and application of affirmation requirements individually, but will only do so as the result of an authoritative and encompassing single decision of this Court striking down

the nationwide crazy-quilt of affirmation requirements.

As the decision in Brown-Forman is applicable to all prospective affirmation practices, all prospective affirmation requirements ought to be declared invalid once and for all, rather than requiring piecemeal, seriatim litigation over each such statute. Pennsylvania believes, however, that the reasoning in Brown-Forman properly applies to all retrospective and contemporaneous affirmation requirements as well. As the facts demonstrate, any type of affirmation statute acts both (1) individually to dictate prices extraterritorially, and (2) in concert with other such state statutes to regulate the price of alcohol throughout interstate commerce. There is simply no distinction of constitutional magnitude among affirmation requirements. They all must fail.

The clear touchstone for decision in this case is Brown-Forman. There this Court recognized, citing Baldwin v. G.A.F. Seelig, Inc., 294 U.S. 511, 528 (1935), that "[w]hile a State may seek lower prices for its consumers, it may not insist that producers or consumers in other States surrender whatever competitive advantages they possess." Brown-Forman, 476 U.S. at ___, 106 S.Ct. at 2084.

In Baldwin, the Court invalidated a New York "equal price" milk statute similar to liquor affirmation provisions. The New York statute in Baldwin required distributors selling milk in New York to warrant that, if they purchased milk from producers outside New York, they would pay a price no lower than the price charged by New York producers for similar milk. 294 U.S. at 520. This Court struck down the statute as a direct restraint on interstate commerce, id. at

521-22, 525-26, 528, declaring that "New York has no power to project its legislation into Vermont by regulating the price to be paid in that state for milk acquired there." Id. at 521.

As the Brown-Forman Court observed, "Justice Cardozo's opinion for the Court [in Seelig] recognized that a State may not 'establish a wage scale or a scale of prices for use in other states, and . . . bar the sale of the products . . . unless the scale has been observed.'" Brown-Forman, 476 U.S. at ___, 106 S.Ct. at 2085 (quoting Seelig, 294 U.S. at 528). Thus, the Court noted in Brown-Forman that "[t]he mere fact that the effects of New York's [affirmation statute] are triggered only by sales of liquor within the State of New York therefore does not validate the law if it regulates the out-of-state transactions of distillers who sell in-state." Id. The question, then, was

"whether New York's affirmation law regulates commerce in other States." Id.

This Court concluded that, like the statute in Baldwin, it did. "That the [Affirmation] Law is addressed only to sales of liquor in New York is irrelevant if the 'practical effect' of the law is to control liquor prices in other States." Id. at ___, 106 S.Ct. at 2086 (citing Southern Pacific Co. v. Arizona ex rel. Sullivan, 325 U.S. 761, 775 (1945)). See also Healy I, supra, 692 F.2d 275, 279 (2d Cir. 1982) ("Thus, it has been held repeatedly that where the practical effect of a state regulation is to control conduct in other states, the regulation violates the Commerce Clause.") (citing Edgar v. MITE Corp., 457 U.S. 624, 642 (1982); Southern Pacific, supra; Seelig, supra; Shafer v. Farmers Grain Co., 268 U.S. 189, 199 (1925); New York, Lake Erie & W. RR

v. Pennsylvania, 153 U.S. 628, 646 (1894)), summarily aff'd, 464 U.S. 909 (1983).

The Court found that the "practical effect" of the New York affirmation provision was, indeed, to control liquor prices in other states. The reasoning in Brown-Forman is directly applicable to all affirmation statutes, regulations, policies and practices.

On their face, affirmation requirements key prices in the regulating state to prices in other states in such a way as to regulate directly out-of-state prices in precisely the same way as the statute struck down in Baldwin, supra. Affirmation requirements simply are not internally directed -- they are extraterritorial. By requiring that distributors warrant that they will not sell alcohol in Pennsylvania (or anywhere else) at a lower price than that in the regulating state, the regulating state clearly

"project[s] its legislation into [Pennsylvania] by regulating the price to be paid in that state for [alcohol] acquired there." See Baldwin, 294 U.S. at 521.

As the Baldwin Court stated, "commerce between the states is burdened unduly when one state regulates by indirection the prices to be paid to producers in another." Id. at 524. Any affirmation requirement clearly involves just such regulation, barring access to a state's market unless a producer refrains from price reductions in other states. Thus, for example, the court in Brown-Forman Corp. v. South Carolina Alcoholic Beverage Control Comm'n, 643 F. Supp. 943 (D.S.C. 1986), found as fact that "South Carolina's Affirmation Statute dictates the price Brown-Forman charges for Jack Daniel's Black Label in Arizona and keeps that price artificially high." Id. at 948.

On a practical basis, the affirmation system -- regardless of the form of any specific state's requirement -- compels sellers to offer their products to all wholesalers at the same price in all thirty-eight states. Each state's price affirmation requirement has the effect of converting the maximum wholesale price in that state into the de facto minimum wholesale price in all states. A price increase to a wholesaler in one state must be accompanied by an identical increase to all public and private wholesalers in the other thirty-seven states pursuant to that state's affirmation requirement. A price decrease must be accompanied by an identical decrease to all public and private wholesalers in the other thirty-seven states pursuant to the requirements of these other states; therefore, price decreases will occur in one local market only if it is economical for the distributor to

reduce the price equivalently across the country.

Affirmation provisions make it impossible, in short, for distillers to respond to market pressures and set their prices in one state without forcing them to alter their pricing policies in other states. See Joseph E. Seagram & Sons v. Gazzara, 610 F. Supp. 673, 675 n.3. (S.D.N.Y. 1985), rev'd. per curiam, 800 F.2d 49 (2d Cir. 1986). In setting a sales price for its product in Pennsylvania, any interstate supplier must price that product with the certain knowledge that it has no choice but to offer the same price in each Defendant State. Thus, each Defendant State's affirmation policy -- whether retrospective, prospective, or contemporaneous -- requires that an interstate supplier slavishly adhere to market conditions existing in all Defendant States as a factor in setting its Pennsylvania

price. The uniform price then offered to wholesalers nationally bears no direct relationship to the price which any given wholesaler, such as the Pennsylvania Liquor Control Board, would otherwise pay.

Affirmation is a system which in operation merely insures that all wholesale customers receive a uniform price, not a competitive price. When each Defendant State individually controls the lowest price which a supplier may charge Pennsylvania, by tying that price to the price offered by the supplier to its smallest private wholesale customer in any of the thirty-eight states, irrespective of actual cost factors, the concept of a single national market place, unimpeded by insular state regulation, is defeated. The cumulative effect of all affirmation requirement is unlawfully to burden interstate commerce because of the extraterritorial impact on supplier pricing

decisions in transactions occurring wholly beyond the regulating state's borders. This direct extraterritorial regulation of commerce is barred by the Commerce Clause.

The Court observed in Brown-Forman that "the proliferation of state affirmation laws following this Court's decision in Seagram has greatly multiplied the likelihood that a seller will be subjected to inconsistent obligations in different States." 476 U.S. at ___, 106 S.Ct. at 2087. Thus, as Justice Blackmun asserted,

> Seagram is now a relic of the past. It was decided when affirmation statutes were comparatively new and long before the proliferation of overlapping and potentially conflicting affirmation statutes that has taken place in the last two decades. I see no principled distinction that can be drawn for constitutional analysis between New York's current prospective statute and the same State's retroactive statute upheld in Seagram. . . .

Id. at ___, 196 S.Ct. at 2088 (Blackmun, J., concurring).

The Court counseled in Brown-Forman that "[i]f there is a conflict between today's decision and the Seagram decision," as Justice Blackmun asserted there was, "there will be time enough to address that conflict should a case arise involving a retrospective statute." Id. at ___ n.6, 106 S.Ct. at 2087 n.6. The time to address that issue is here. In the two years since Brown-Forman, it has become apparent that despite the clear ruling of this Court, states with prospective statutes will not abandon them unless forced to do so individually by litigation -- let alone those states with retrospective or contemporaneous requirements. In the meantime, Pennsylvania and consumers in states across the country are being forced to pay hundreds of millions of dollars each year that they should not have to, because lower prices are effectively proscribed in their

states by operation of price regulatory schemes enacted by other states.

This system regulates commerce nationally. Yet it is wholly the product of state laws and requirements with extraterritorial effect. The requirements are instituted in order to obtain a competitive advantage for in-state consumers. These requirements thus have all the badges of incompatibility with the commerce clause. See, e.g., Edgar v. MITE Corp., 457 U.S. 624, 640-43 (1982) (plurality op.); Philadelphia v. New Jersey, 437 U.S. 617 (1978). The network of conflicting affirmation practices, even when contemporaneous, renders the nature of state-by-state affirmation requirements further suspect as unduly burdensome on interstate commerce in a fashion reminiscent of the interstate truck and train cases. See Kassel v. Consolidated Freightways Corp., 450 U.S. 662 (1981); Raymond Motor

Transportation, Inc. v. Rice, 434 U.S. 429 (1978); Southern Pacific Co. v. Arizona ex rel. Sullivan, 325 U.S. 761 (1945); South Carolina State Highway Dept. v. Barnwell Bros., 303 U.S. 177 (1938).

Pennsylvania's inability to obtain volume discounts and other trade considerations -- which it could obtain in a free market -- solely because of the operation of the laws and policies of other states has required the Commonwealth to pay hundreds of millions of dollars more for its purchases since the decision in Seagram.

Some states argue in defense of affirmation that it is properly designed to protect their consumers against the great buying power of large private wholesalers and large-state liquor monopolies being used to obtain just such volume discounts at the expense of everyone else. They argue that Pennsylvania's ability to exert its true

market power to obtain lower prices would necessarily result in higher prices to other customers; they assert, moreover, that allowing a large-state liquor monopoly to exert monopsony power in this way is in effect no different from what it is achieved through affirmation practices, forcing liquor distributors to give a state's own consumers the lowest possible price.

But there is a clear difference. An affirmation law bars access to a state's market unless a producer refrains from price reductions in other states; it mandates that a liquor producer cannot offer its product for sale in another state below a certain price. Using market power to obtain the lowest price one can possibly obtain, however, is not the same as mandating that the seller cannot sell below that price to anyone else -- using market power in this way, in fact, is what happens in the free market

every day. The fact that smaller buyers than Pennsylvania are unlikely to be able to drive a better bargain than Pennsylvania is not the same as saying that Pennsylvania forbids better deals in other states at pain of losing all legal right to sell in Pennsylvania.

The latter clearly violates the commerce clause, all the more so as it is undertaken for the explicit purpose of securing commercial advantages to the enacting state's consumers. See Edgar v. MITE Corp., 457 U.S. 624, 640-43 (1982) (plurality op.); Philadelphia v. New Jersey, 437 U.S. 617 (1978).

In sum, there is no justification for the continuance of the affirmation system. Many states recognize this, but cannot afford to let go of the affirmation system themselves unless all other states do so as well, anymore than the proverbial hunter can afford

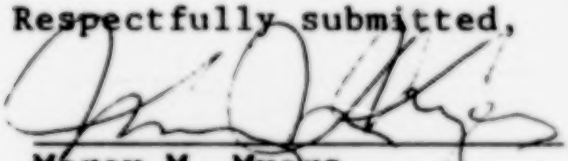
to let go of the wolf that he has by the ears.

Pennsylvania therefore asks this Court to resolve state failure to remedy this constitutional violation despite the decision in Brown-Forman, by issuing a definitive ruling in this case declaring price affirmation requirements unconstitutional.

CONCLUSION

For the foregoing reasons, this Court ought properly declare all alcoholic beverage price affirmation requirements to be unconstitutional, and affirm the judgment of the court below.

Respectfully submitted,



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